

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.402 OF 2022

T. Muthu Lakshmi w/o. Tirumali Pandaram
Through POA V.Venkatachalam ... Petitioner
Versus
The Municipal Corporation of Greater
Bombay and Ors. ... Respondents

AND
WRIT PETITION NO.941 OF 2022

Vijay Prakash Kashinath Tiwari ... Petitioner
Versus
The Municipal Corporation of Greater
Bombay and Ors. ... Respondents

— —
Mr. Bhavesh Parmar i/by Mr.Devmani J. Shukla for the Petitioner.
Mr. R.Y. Sirsikar for Respondent No.1.
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CORAM : SHARMILA U. DESHMUKH, J.

DATE : July 7, 2023.

P. C. :

1. Heard.
2. The challenge in both these petitions is to the order dated 21st October 2021, allowing the application of defendant No.3 and permitting them to file their written statement. As both the petitions raise common issue, the same are taken up for hearing together and decided by this common order.

3. The facts of the case is that L.C. Suit No.280 of 2016 and L.C. Suit No 2808 of 2016 were filed by the petitioners-plaintiffs seeking to challenge the notices which were issued by the Corporation in respect of their structures. The suit came to be filed in 2016 and the undisputed position is that service of the summons was waived on 24th February, 2017. No written statement was filed by the Defendant No.3 therein and on 30th July, 2019, an application was moved seeking the relief of condonation of delay in filing the written statement and for taking the written statement on record. This application was resisted by the plaintiffs by reply dated 21st October, 2021, which is a handwritten reply on the notice of motion itself objecting on the ground that the application does not state the number of days of delay, subject to order of the Court and costs may be imposed. The trial Court on consideration, allowed the applications in both the suits and granted permission to file the written statements.

4. Heard Mr. Bhavesh Parmar learned counsel appearing for the Petitioners and Mr. R.Y. Sirsikar, learned counsel appearing for the Respondent No.1.

5. Learned counsel appearing for the Petitioners submits

that in spite of the suit structures having been protected by law, in view of the decision of the Apex Court that the structures in question are prior to the *datum* line, at the instance of Defendant No 3, the notices were issued by defendant no.1- Corporation. He would further submit that although the service of summons was waived in February, 2017, the written statement was not filed by defendant no.3. He would further submit that in a causal manner the application has been moved without stating the number of days of delay in filing the written statement. He would further point out that the explanation which is tendered in the affidavit-in-reply is that the said fact came to the knowledge of defendant no.3 on 21st January, 2019, when the interim applications were disposed of and in spite thereof the application came to be filed in July, 2019 without any explanation for the delay.

6. The submissions of the learned counsel for the Petitioner are that there is no explanation tendered in the application for the delay caused in filing of the written statement which according to the provisions of CPC are required to be filed within a period of 30 days which period can be extended upto 90 days.

7. It is now settled by catena of decisions that the provisions

of Order 8 Rule 1 of CPC are directory and not mandatory and it is the discretion of Court to permit the filing of written statement considering the facts and circumstances of each case. In the present case, in the affidavit in support of the notice of motion, it has been stated that the written statement was drafted and affirmed before the notary on 14th September, 2016, this position is not disputed by the learned counsel for the Petitioner. The affidavit further states that the defendant no.3 was under the impression that the same was filed in the Court proceedings and , in the interregnum, there was interim applications which were taking up for hearing, the written statement remained to be filed. Armed with this explanation the application has been moved seeking the condonation of delay in filing for the written statement and for taking the written statement on record.

8. No doubt, it is expected that in filing the application, the number of days of delay is required to be mentioned and the explanation for the delay to also commensurate with the days of delay. However, it is settled that each and every day of delay is not required to be explained. In the present case, upon perusal of the affidavit the explanation has been set out that due to the oversight the written statement was not filed till the year 2019. This Court

would have disbelieved the explanation if the written statement was not shown to be affirmed before the Notary on 14th September, 2016. That being factual position, in my opinion, the discretion exercised by the Trial Court cannot be faulted with. It is also required to be noted that no detailed reply to the application was filed by the Petitioner/s and from the reply which is in handwritten, it appears that the same was left to the Court for its decision.

9. Learned counsel appearing for the Petitioner has relied upon the decision of this Court in the case of **Suresh s/o. Daduram Abnave vs. Municipal Corporation of Greater Mumbai and Ors.** in **[Appeal From Order No.807 of 2011 in Notice of Motion No.1334 of 2009 in L.C.Suit No.2802 of 2009 with CAA/1067/2011]**, in support of his submission that the filing of vakalatnama or appearance of the parties amounts to service of summons. It does not appear from the affidavit in support of notice of motion that it is the case of defendant no.3 that as there was no service of summons, the period for filing of written statement would not commence. On the contrary, the application candidly states that there has been service of summons as the service was waived on 24th February, 2017.

10. In that view of the matter, there is no cause for

interference in the impugned orders dated 21st October, 2021 passed in both the above petitions.

11. Both the writ petitions stand dismissed.

(Sharmila U. Deshmukh, J.)